

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 5, 2006 Session

**LEVY WRECKING COMPANY v. CENTEX RODGERS, INC. v. NORTH
AMERICAN SPECIALTY INSURANCE COMPANY v. A-L COMPRESSED
GASES, INC.**

**Appeal from the Chancery Court for Davidson County
No. 03-380-IV Richard Dinkins, Chancellor**

No. M2005-01196-COA-R3-CV - Filed on October 6, 2006

This appeal concerns the priority of two competing liens. One is an attorney fee lien for representation of a party in this action. The other is a lien filed against the same party, which resulted from a judgment in a separate action. The law firm of Smith and Cashion represented the plaintiff, Levy Wrecking Company, throughout these proceedings. Following a bench trial Levy was awarded a monetary judgment against which Smith and Cashion was awarded a lien to secure payment of attorney fees. Prior to the entry of the final order in this action, A-L Compressed Gases, Inc., intervened in this action to perfect a lien for a judgment it had been awarded against Levy in an unrelated action. Since there were insufficient funds to satisfy both liens, a dispute arose as to the priority of the competing liens. The trial court held that A-L had perfected its lien first and, thus, had priority. Levy's counsel contends the lien for attorney fees related back to the commencement of this action, and therefore its lien has priority. We reverse.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and PATRICIA J. COTTRELL, J., joined.

Gregory L. Cashion and S. Joe Welborn, Nashville, Tennessee, for the appellant, Levy Wrecking Company.

Thomas W. Shumate, IV, Nashville, Tennessee, for the appellee, A-L Compressed Gases, Inc.

OPINION

This action commenced when Levy Wrecking Company filed a complaint for breach of contract against Centex Rodgers, Inc. Levy alleged that Centex was indebted to it for services it rendered pursuant to two projects at Vanderbilt University Medical Center. Levy was the subcontractor to Centex on each project for which it rendered demolition services. The first project was the Infectious Disease Project. The second was referred to as the MRB III project.

A dispute arose between Levy and Centex following which Centex withheld progress payments for work Levy contends it completed. When Centex refused to comply with Levy's demands for progress payments, Levy walked off the job without completing the balance of the work called for in the contracts and engaged the law firm of Smith and Cashion to file this action against Centex for breach of contract, unjust enrichment, and violation of the Tennessee Prompt Pay Act. In March of 2003, Centex filed its Answer to the Complaint as well as a counter-claim for breach of the subcontracts alleging Levy failed to complete the work and for failure to pay Levy's subcontractors.

Following a bench trial, the trial court issued a Memorandum Opinion setting forth its findings, which included, inter alia, that Centex had breached the contract regarding the MRB III project, and that Levy had breached the contract by walking off the job site without completing the work. After determining the amount owed to Levy and the amount owed to Centex on its counterclaim, the trial court awarded Levy a net judgment for \$63,013.51. The order did not address any claim for attorney fees.

Thereafter, on September 8, 2004, Centex filed a Motion to Alter or Amend the August judgment. Centex asked the trial court to omit the award of damages to Levy for cost overruns and award Centex attorney's fees because it prevailed on part of its counterclaim for breach of contract against Levy. By Order filed in September of 2004, the trial court denied the Motion to Alter or Amend the award of damages to Levy. The trial court addressed Centex's request for attorney fees by separate order entered October 29, 2004, in which it awarded Centex \$21,501.50 in attorney fees, finding that "Centex Rodgers is entitled to certain of its attorney's fees in this litigation pursuant to paragraph 14(A) of the MRB III subcontract."

Thereafter, on November 19, 2004, counsel for Levy, Smith and Cashion, filed a Notice of Attorney's Lien. One week later, on November 24, 2004, it filed an Amended Notice along with a Motion to Alter or Amend the Judgment to include a notation of the Attorney's lien. The parties, Levy and Centex, submitted an Agreed Order granting the Motion to Alter or Amend to include the notation of Smith and Cashion's attorney fee lien. Additionally, by separate Order styled "Final Order and Judgment," Levy was awarded a \$41,415.01 judgment against Centex with the notation that Smith and Cashion had an attorney's lien against the full amount of the judgment pursuant to Tenn. Code Ann. § 23-2-102. Both of these orders were dated November 29, 2004.

Two days later, on December 1, 2004, A-L Compressed Gases, Inc. filed a Motion to Intervene in this action, in which A-L stated it had obtained a judgment against Levy on July 23, 2003, in the amount of \$10,073.50. A-L acknowledged Smith and Cashion's lien, but contended its lien had priority over Smith and Cashion's lien. A-L's judgment against Levy had been filed as a judgment lien with the Davidson County Register of Deeds in August of 2003.¹ Neither Levy nor Centex opposed A-L's Motion to Intervene, and the trial court granted the motion.

¹The record also reveals that in November of 2004, A-L had filed a levy with the General Sessions Court of Davidson County, Tennessee, for \$11,440.70 in an effort to attach the judgment proceeds owed by Centex to Levy.

A-L then filed a Motion to Set Aside the November order that made the judgment between Levy and Centex “final,” which was the same order that included the notation that Smith and Cashion had an attorney’s lien. A-L also filed a Motion to satisfy its judgment lien out of the proceeds Centex owed Levy. That motion was followed by Levy’s motion to enforce Smith and Cashion’s attorney fee lien. The trial court granted A-L’s motion and denied Levy’s motion, finding A-L’s lien had priority over Smith and Cashion’s lien. Levy appeals.²

STANDARD OF REVIEW

No genuine material factual disputes are presented. The issue presented hinges on the proper interpretation of Tennessee statutes and their application to the facts of this case. Issues involving the construction of statutes and their application to facts involve questions of law. *Memphis Publ’g Co. v. Cherokee Children & Family Servs., Inc.*, 87 S.W.3d 67, 74 (Tenn. 2002); *Waller v. Bryan*, 16 S.W.3d 770, 773 (Tenn. Ct. App. 1999). Therefore, the trial court’s resolution of these issues is not entitled to Tenn. R. App. P. 13(d)’s presumption of correctness on appeal. We will review the issues de novo and reach our own independent conclusions regarding them. *King v. Pope*, 91 S.W.3d 314, 318 (Tenn. 2002).

ANALYSIS

Levy contends the attorney fee lien in favor of Smith and Cashion has priority because the lien relates back to the commencement of the action pursuant to Tenn. Code Ann. § 23-2-102. A-L counters, contending Smith and Cashion waived its lien because its notice of lien was not timely because it was not noted in the August 19, 2004 order, which became a final judgment prior to the Notice of Lien and the Motion to note the attorney lien in the judgment. A-L also contends its lien has priority because it was perfected prior to the attorney fee lien. We find Levy has the better argument.

I.

Notice of Smith and Cashion’s lien was provided with the notation of the attorney’s lien in the November 29, 2004 judgment. This Motion was filed less than thirty days after the trial court’s order of October 29, 2004, but more than thirty days after the order of August 19, 2004. The delay between the August order and the November Motion, however, is of no consequence because the August order was not a final order. The August order was not a final judgment because all issues between the parties had not yet been resolved.

²A-L has argued that this appeal is actually an appeal by Smith and Cashion, and that Smith and Cashion has no standing to pursue this appeal because it was not named in the Notice of Appeal. Smith and Cashion, however, is not the party pursuing this appeal. The Notice of Appeal was filed by Levy, and Levy is the appellant in this action. The Appellant’s brief was submitted by Smith and Cashion as counsel for Levy. A-L argues that Smith and Cashion is the only party that benefits from this action, but we find Levy has an interest in ensuring its financial obligations to its attorney are satisfied.

“[A]ny order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before entry of a final judgment adjudicating all the claims, rights, and liabilities of the parties.” *Grissim v. Grissim*, 637 S.W.2d 873, 875 (Tenn. Ct. App. 1982) (citing Tenn. R. App. P. 3(a)). Moreover, the August order was not a final judgment because the trial court had not made a notation in the order that it was final and appealable pursuant to Tenn. R. Civ. P. 54.02.

Levy did not err in filing its Motion to Amend to add the notation of Smith and Cashion’s attorney’s lien on November 24, 2004. The motion was timely and the resulting order afforded Smith and Cashion the continuing benefits afforded by Tenn. Code Ann. § 23-2-102 against those who were not parties to the action and who were not aware that a lien was claimed.

II.

Attorneys of record who begin a suit on behalf of a plaintiff shall have a lien on the plaintiff’s right of action from the date of the filing of the suit.³ Tenn. Code Ann. § 23-2-102. The lien covers expenses that are reasonably incurred by the plaintiff’s attorney of record in the action that resulted in a recovery for the client. *Peoples Nat’l Bank of Washington v. King*, 697 S.W.2d 344, 347 (Tenn. Ct. App. 1985). In considering the coverage of the lien, the Tennessee Supreme Court has determined “there should be no distinction between compensation for services and expenses necessarily incurred in the rendition of the professional service.” *Peoples Nat’l Bank*, 697 S.W.2d at 347.⁴

The attorney fee lien is a charging lien. *Starks v. Browning*, 20 S.W.3d 645, 651 (Tenn. Ct. App. 1999) (citing *Southern v. Beeler*, 195 S.W.2d 857, 870 (Tenn. 1946)). A charging lien is based on a lawyer’s equitable right to have the fees and costs due for the lawyer’s services in a particular action secured by the judgment or recovery the attorney helped obtain in that action. *Id.* As long as the attorney worked to secure the judgment for the client, a lien may attach to any proceeds flowing from the judgment. *Id.* The lien afforded by Tenn. Code Ann. § 23-2-102 attaches to “anything involved, i.e., land or money paid in court.” *In re Pass*, 258 B.R. 170, 172 (Bkrcty E.D. Tenn. 2001).

³The lien provided in Tenn. Code Ann. § 23-2-102 must be distinguished from the lien afforded to an attorney under Tenn. Code Ann. § 23-2-103 employed subsequent to the commencement of the action, in which case the lien does not relate back to the commencement of the action. See Tenn. Code Ann. § 23-2-103.

⁴Attorneys have this statutory lien provided they have provided adequate notice of the lien to the public. *Schmitt v. Smith*, 118 S.W.3d 348, 353 (Tenn. 2003). This notice, however, may not be necessary when the dispute regarding the lien is solely between the attorney and his or her client. *Schmitt*, 118 S.W.3d at 353 (discussing *Starks v. Browning*, 20 S.W.3d 645, 651 (Tenn. Ct. App. 1999)). Formerly, an attorney was required to have the attorney’s lien noted in the final judgment in order to benefit from the lien. *Chumbley v. Thomas*, 198 S.W.2d 551 (Tenn. 1947), *overruled in part by Schmitt*, 118 S.W.3d at 353. *Schmitt*, however, overruled this requirement, specifically holding that “so long as adequate notice of the lien is provided to the public and to future purchasers, the requirements of Tennessee Code Annotated sections 23-2-102 and 23-2-103 are satisfied.” *Schmitt*, 118 S.W.3d at 353.

Tenn. Code Ann. § 23-2-102 expressly provides that the lien relates back to the commencement of the action. This action commenced when Smith and Cashion filed the Complaint on behalf of Levy on February 10, 2003. A-L perfected its judgment lien against Levy on August 14, 2003. Smith and Cashion's attorney's lien relates back to the commencement of this action, which precedes August 14, 2003. Thus, the lien of A-L is subsequent in time to that of Smith and Cashion and therefore cannot constitute a priority lien.

The judgment of the trial court is reversed, and this matter is remanded with costs of appeal assessed against A-L Compressed Gases, Inc.

FRANK G. CLEMENT, JR., JUDGE